No. 558. 245.

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Supreme Court of the United States.

By. of Frink for Respondent.

OCTOBER TERM, 1900.

No. 558. Filed Feb. 23, 1901.

HENRY L. WARD, TREASURER, *Petitioner*,

v.

EDWARD JOSLIN, *Respondent*.

IN THE MATTER OF THE PETITION OF

HENRY L. WARD, TREASURER,

FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

BRIEF FOR RESPONDENT.

J. S. H. FRINK,

Attorney for Respondent.

PORTSMOUTH, N. H.

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BRIEF FOR RESPONDENT.

We do not suppose that in this petition for certiorari it is either necessary or proper to discuss this whole case. If the writ should issue, then an opportunity will be had for full discussion. The only question arising upon this petition is whether questions of such gravity and importance are involved as to require or justify a review by the Supreme Court. We can best determine that question by consideration of the opinion of the Circuit Court of Appeals. The essential questions determined by that court were:—

(1) Whether under the general rule of banking law, a banking corporation has power, independent of any organic authority, to guarantee the notes of third parties in which it has no interest. The decision was entirely in accord with the general rule of commercial paper.

(2) Whether or not the laws of Kansas authorized such a guaranty, and the court found that it did not. This decision seems entirely right, but even if it were not, it would not present a question of such gravity and importance as to require a review by this court.

(3) Finally the court held that an unauthorized guaranty—a guaranty *ultra vires* the corporation itself—was not comprehended in the term "dues" as used in the Constitution and Statutes of Kansas. A full consideration of the reasoning and authorities, which it seems unnecessary to cite in this application, seems to lead irresistibly to this conclusion.

We know no rule excepting the judgment of the judges of the Supreme Court by which to determine what cases will be deemed by them to be of such gravity as to demand a review.

This application, as we apprehend it, does not proceed upon the basis that there is any Federal question involved in this case. If there had been, writ of error would seem to have been a more appropriate proceeding.

The case In re Woods, Petitioner, 143 U. S. 202, seems to involve questions more nearly analogous to the one under consideration than any other with which we are familiar.

J. S. H. FRINK,
Attorney for Respondent.

2805

No. 245.

Brief of Frink for Respondents.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 245.

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EDWARD JOSLIN, DECEASED, RESPONDENT,

HIRAM BLAKE AND WALLACE L. MASON,
EXECUTORS.

BRIEF FOR RESPONDENTS,

BY J. S. H. FRINK.

JOURNAL JOB PRINT, PORTSMOUTH, N. H.

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HIRAM BLAKE AND WALLACE L. MASON, EXECUTORS.

BRIEF FOR DEFENDANTS.

STATEMENT OF MATERIAL FACTS.

A creditor of a Kansas corporation having obtained judgment against the corporation in Kansas, which is unsatisfied, brings in New Hampshire this suit against a stockholder to enforce the individual liability prescribed under the laws and constitution of the State of Kansas.

The case was tried before the Circuit Judge without a jury.

To establish his case, the plaintiff put in evidence a certified copy of the record setting forth the basis of the judgment against the corporation.

From this record of the judgment, introduced by the plaintiff, the Circuit Court found as a *matter of fact*, upon the evidence contained in the record, and upon the argu-

ments, that the plaintiff's claim against the corporation (Loan and Trust Company) was *upon a guaranty* given upon a valuable consideration, of the payment of certain promissory notes, from one third party to another, and *was not a guaranty of the payment of securities negotiated by the company.*

Record p. 6.

And as a further proposition of fact the court also found that the guaranty was not within the reasonable and proper scope of the business of the corporation as contemplated by the parties.

Record, p. 7. See also opinion of Judge Aldrich, 100 *Fed.* 677.

We quote further from the findings of fact by the Circuit Judge.

Mr. Justice Aldrich found as a matter of fact, that the business of the corporation (in which the defendant was a stockholder) was "to buy and sell personal property, including stocks, bonds, bills, notes, real and chattel mortgages, and choses in action of every kind and description, and to transact the business of a loan and trust company," and he proceeds to say:—

"Some time after the organization of the company, and before the defendant became a stockholder, the directors thereof resolved 'that the president and secretary of the company be, and they hereby are, authorized to guarantee the payment of all securities negotiated by the company by indorsing upon any such security one of the following forms of a guarantee;' and the resolution of the corporation and the forms of guarantees printed in the record are referred to and made a part of the findings."

He adds "Ascertaining the relations of the parties under the contract, which resulted from the Kansas constitution and the statutes and the defendant's ownership of stock, I find, so far as it is a question of fact, that the dues to be secured by the superadded stockholders' liability

were such as were within the reasonable and proper scope of the business as contemplated by the parties, and that a guarantee of this character was not intended by the defendant stockholder, and was not contemplated by the Kansas constitution as a due or a debt within such scope. I also find, so far as it is a fact, that it was not within the scope of the resolution which assumed to authorize the president and secretary to guarantee securities *negotiated* by the company, and there is no evidence that the defendant stockholder had knowledge that the company was assuming, through its president and secretary, to guarantee the payment of claims *not negotiated* by itself; and there being no evidence of notice, I find, as a matter of fact, that he was not aware of it.

"I also make a general finding for the defendant."

Finding of facts by Aldrich Judge,

Pages 6 and 7 of the Record, also charter of corporation page 28 of the Record.

(In this brief we refer to the numbers at top of pages of Record.)

The form of guaranty adopted by the Directors, to which the Circuit Judge refers and makes part of his findings of fact, is in these words:—

"For a valuable consideration the Western Investment Loan and Trust Company hereby guarantees payment of the within obligation, both interest and principal, at maturity.

See page 69 Record.

It appeared that on the 12th day of September, 1888, S. S. Hite and Mary L. Hite executed and delivered to one J. E. Ethell their certain promissory notes, in writing, of that date, whereby, for value received, they promised to pay to the order of said J. E. Ethell, on the 12th day of September, A. D., 1892, the principal sum, with interest thereon at the rate of seven per cent per annum, from date until paid, payable semi-annually, according to tenor of

eight (8) interest coupons, bearing even date, and annexed to said note. Said principal and interest being payable at the office of the Western Investment Loan & Trust Company at Topeka, Kansas; that afterwards, and before the maturity of said notes, Ethell, for a valuable consideration, endorsed, transferred and delivered the said notes to this plaintiff.

About the time of the endorsement of said notes to the plaintiff by said Ethell the said Western Investment Loan & Trust Company, in writing, guaranteed the payment of the same in words before recited.

See original petition, Record, p. 66-72.
Also record of judgment, pages 81-82 of Record.

Said notes and mortgage not having been satisfied, this plaintiff brought suit against The Western Investment Loan & Trust Company on said guarantee, and recovered judgment against said company by default; the execution issued on said judgment having been returned "*nulla bona*," the Plaintiff brought this suit against the defendant to recover of him, as an alleged stockholder in said Western Investment Loan & Trust Company, the amount of his stock, under the Constitution and Statutes of Kansas.

Upon this statement of the pivotal facts in the case, the defendant claims:—

I. That the guaranty of these notes of a third party, was not within the scope of the powers of this corporation, under its organic law, nor incident to the transaction of the business for which it was established, and was therefore "ultra vires the corporation itself," and formed no basis for a judgment.

II. That the finding of the Circuit Court upon these questions, so far as they are findings of fact, are not reviewable in an appellate Court, and that the conclusions

of the Circuit Court are fully sustained by an inspection of the record, and the application of the general law, to the facts found.

III. That under the laws and constitution of Kansas a claim "ultra vires the corporation" is not one of a class for which a stockholder is liable, and constitutes a risk which he could not anticipate and has never undertaken.

IV. That for the purpose of determining whether the judgment attempted to be enforced against a stockholder is of a class for which he is liable, and comes within the intendment of the laws and constitution of Kansas, imposing individual liability, the judgment may be re-examined.

GUARANTY NOT WITHIN POWERS OF THE CORPORATION.

We submit, that this contract of guaranty was not within the chartered powers of said Western Investment Loan & Trust Co.

It is elementary law that a corporation has power only to do such business as it is authorized to do by its Act of Incorporation and no other.

If it exceeds its chartered powers, those who have subscribed for its stock may avoid any contract made by the corporation in excess of its powers.

Of course, in construing the chartered powers of a corporation, not only the powers specifically granted, but those implied powers necessary to carry into effect those granted, are included.

To enable this corporation to transact the business contemplated in its charter, it was not necessary for it to guarantee the securities of these parties. The very fact that it transacted its business for some time without exercising this power, shows it was not a necessary incident.

A man might be entirely willing to embark his money in a corporation that simply bought and sold notes and mortgages, but when it came to the business of guaranteeing the payment of the contracts of third parties, in which the company had only a commission interest, and which involved hazards and amounts not anticipated, a party might be entirely unwilling to become a stockholder.

The business by this act was converted from the comparatively safe one contemplated by the charter, to one involving risks of great magnitude.

If it had appeared that these notes were the property of the Kansas Investment Loan & Trust Company at the time of the guaranty, and negotiated by it, such an act would be within its chartered powers, but no such fact appears. It appears that the notes, etc. were given to one Ethell, and endorsed directly to the plaintiff, by him, and the petition and judgment nowhere recites or sets forth any title in or negotiation of them, by the Loan and Trust Company.

The articles of association as well as the findings of the Circuit Court, show that this Corporation had no power to guarantee their payment.

The case stands upon the proof that the company guaranteed, without any interest in them, the notes of third parties, for a consideration. The rule that the individual stockholders cannot question the corporate acts of the directors, has no application, because this question goes to their powers, not to any irregularity in the mode of exercising a power.

Upon the question as to the authority of the company to guarantee the payment of these notes, we quote from *National Park Bank vs. German-American Company*, 116

N. Y. 281, because it seems to state the law concisely and correctly :—

"Counsel have not directed our attention to, nor have we found in any of the statutes referred to, a provision empowering the defendant to bind itself by making or endorsing promissory notes for the accommodation of the makers, for a consideration paid. It is well settled that such a power is not incidental to the powers expressly conferred on corporations organized under statutes authorizing the formation of corporations for banking, insuring, manufacturing and like business corporations."

If it is said this question of authority is one of local, not general, law; we find nothing in the statutes or decisions of Kansas sustaining any different rule from the general one before stated.

This question was carefully considered by Judge Putnam of the Court of Appeals, as appears by his opinion; and a somewhat careful investigation of the later decisions discovers nothing in conflict with his conclusions.

We only repeat what the Court of Appeals has said in its opinion on *page 88 of the Record*, that while, under the laws of Kansas, banking corporations are authorized to buy and sell, exchange, and discount negotiable paper, yet nowhere is authority given them to guarantee notes of third parties, not created in the ordinary course of its business, and which they do not own.

This is not simply an undertaking entered into by an officer of the bank without authority on his part to bind the bank, but an undertaking which the bank itself could not make or authorize any of its officers to make for it.

The promise of the bank was beyond the scope of its powers and absolutely null and void; the judgment rests upon no cause of action whatever.

Brownsville v. Loague 129 *U. S.* 494, 503-505.

Central Transportation Co. v. Pullman Car Co. 139 *U. S.* 24, 59-60.

Among the purposes for which a private corporation may be organized in Kansas, by individual association, is the establishment of Loan and Trust Companies.

Stat. Kansas Sec. 1156 *Ch.* 23.

A charter must be prepared setting forth :—

1st, The name of the corporation.

2nd, *The purposes for which it is formed.*

3rd, The place where its business is to be transacted.

4th, The term for which it is to exist.

5th, The names and residences of its directors.

6th, The amount of its capital stock and number of shares.

Sec. 1161.

Among the powers conferred upon corporations in that state, is the one to enter into any obligation or contract essential to the transaction of its ordinary affairs.

Sec. 1167.

Sec. 1183 provides that no corporation created under the powers of this act shall employ its stock, means, assets, or other property, directly or indirectly, for any other purpose whatever, than to accomplish the legitimate objects of its creation.

This last provision is one of limitation.

We find but two decided cases in Kansas bearing remotely, even, upon the abstract proposition as to the powers of a loan and trust association in that state to bind itself by a guaranty of the obligations of a third party not belonging to it.

Commercial Bank v. The Cheshire Provident Institute, 59 *Kansas,* 361.

Atchison, T. & S. F. R. Co. v. Fletcher, 35 *Kansas* 236.

The former case discusses briefly the power of a banking association in its ordinary course of business to guarantee the payment of obligations, which it negotiates, and which belong to the bank, and arrives at the conclusion that in its ordinary course of business it possesses that power. This is a proposition so elementary that no one will quarrel with it.

The court then makes some strictures upon ultra vires as a defence to corporate contracts and arrives at a conclusion to the effect that such a defence is not open to a corporation having received the benefits of the transaction; an opinion which is at variance, as we understand it, with the rule in

Cent. Transp. Co. v. Pullman Car Co. 139 *U. S.* 24.

that such defence is still open to the corporation.

This decision does not affect the case at bar, for there is no evidence that the Loan and Trust Co. ever received the consideration accruing from the sale of these securities; but we are considering now the power of a banking institution in Kansas to guarantee the payment of notes not owned or negotiated by it, and this case is certainly no authority in favor of that proposition.

If you can gather any conclusion from the opinion as to the power of a loan and trust company in that state to guarantee the payment of the obligation of a third party in which the bank does not own or negotiate, *abstractly* considered, it is that it does not possess that power, although, under some circumstances a corporation may be estopped to deny the transaction.

In that case, there having been a general finding or verdict against the corporation, judgment was ordered in

favor of the party, on the ground, that a general finding must be predicated upon the hypothesis that the question of the power to make the guaranty had been adjudicated. The Court says :—

"The record before us does not contain any of the evidence offered at the trial. The general finding resolves all doubt as to the facts against the plaintiff in error. We must, therefore, presume that the guaranty was executed for a valuable consideration, by the duly authorized officers of the bank, and in due course of business. The claim that a banking institution dealing in commercial paper is without authority to bind itself by a guaranty thereof, has nothing to commend it to especial favor. It is true that, in this case, the paper itself does not indicate that the Commercial bank ever owned it. Nevertheless, it may have received the proceeds, and the guaranty may have been made strictly in the interest of the bank."

The latter case in order of citation *Atchison, &c. R. Co. v. Fletcher*, assuming the premises to be correct that the Atchison Company could receive, in the transaction of its legitimate business, bonds and other negotiable paper, proceeds to say, that having received such negotiable instruments, it may sell and dispose of the same ; and in selling and disposing of the same it may guarantee that they are genuine, and it may also guarantee the payment thereof.

This is only an iteration of the familiar rule of negotiable instruments, and if the company negotiating the same had been in that case a Loan & Trust Company one could well argue by the rule of exclusion, that such power did not reside in a party not owning the obligations guaranteed.

So far as the *usage* of Loan & Trust Companies in that State, to guarantee the payment of the obligations of third

parties, is under consideration, it is a question of fact not of law.

The Circuit Court has determined the question adversely to the plaintiff in error.

SPECIAL FINDINGS OF FACTS.

This was a jury waived case. The findings of fact by the court have the same force and effect as the verdict of the jury. The facts found by the trial justice are conclusive, where there is sufficient evidence to support them, although it may be conflicting.

Grayson v. Lynch, 163 *U. S.*, 468-471.

Rev. St. U. S. 2d Ed. Sec. 649 *and* 700.

The special finding of facts is found on pages 6-7 *of the Record.* The court will not review them unless it clearly appears there was nothing in the evidence to sustain them. The material facts found upon the part of the case before this Court are :—

(1) That the plaintiff's claim against the Loan and Trust Company was upon a guaranty given upon a valuable consideration, of the payment of certain promissory notes from one third party to another, and was not a guaranty of the payment of securities negotiated by the company.

(2) That the business which the corporation was authorized to do was to buy and sell personal property, including stocks, bonds, bills, notes, real and chattel mortgages, and choses in action of every kind and description, and to transact the business of a loan and trust company, and did not include the guaranty of the notes of those parties for a consideration.

(3) That some time after the organization of the Loan & Trust Company and before the defendant became a stockholder, the directors resolved that the president and

secretary of the company be and thereby were authorized to guarantee the payment of all securities *negotiated* by the company by indorsing upon such security a form of guaranty prescribed by the company.

(4) That the dues to be secured by the superadded stockholders' liability were such as were within the reasonable and proper scope of the business of the corporation as contemplated by the parties.

(5) That this guaranty was not intended by the defendant stockholder, and was not contemplated by the Kansas constitution, as a due or debt within such scope.

(6) That such guaranty was not within the scope of the resolution, which assumed to authorize the president and secretary to guarantee securities *negotiated* by the company.

(7) That the defendant had no notice that the company was assuming to guarantee the payment of claims not negotiated by itself.

(8) That there was no evidence of the fact that the defendant had notice of such assumption to guarantee.

Of these findings Nos. 1, 2, 3, 6, 7, 8, would seem to present only questions of fact, while Nos. 4 and 5 may embrace mixed questions of law and of fact, but they must be construed to find as a matter of fact that the guaranty of these notes was not within the reasonable and proper scope of the business of the defendant loan and trust company.

THIS CLAIM ON WHICH JUDGMENT IS BASED NOT ONE CONTEMPLATED BY THE CONSTITUTION OF KANSAS.

The Constitution of Kansas, Article 12, Sec. 2, provides that

"Dues from corporation shall be secured by individual

liability of the stockholders to an additional amount equal to the stock owned by each stockholder."

The question arises, what is meant by the terms "dues" as applied to a stockholder? Does it include every obligation against the corporation however incurred, and which may have become in some way the subject of a judgment against the corporation; or only such "dues" as the corporation can lawfully incur, and such as the stockholder might have reasonably anticipated in his subscription for stock?

In other words, assuming that the primary obligation here was one which the corporation had no power whatever to contract, and was one which was absolutely incapable of ratification, does it, so far as a stockholder is concerned, become a corporate "due" for which he is liable under the constitution of Kansas?

We are unable to call the attention of the Court to any case sustaining very satisfactorily the one view or the other.

From remarks of the Court in certain cases, and by a parity of reasoning in others, as well as the application of equitable principles to the question, it would seem that the true rule of construction should be that the framers of the Kansas constitution did not intend that stockholders should be responsible for every class of obligations.

Thus in *McCormick v. Market Bank*, 165 *U. S.* 538, 549, this Court assigned as one of three grounds why a contract made by a corporation beyond the scope of its corporate powers is unlawful and void, and will not support an action, the interest of stockholders not to be subjected to risks which they have never undertaken.

This suggestion is repeated in

Concord First National Bank, v. Hawkins 174 *U. S.* 364, 371.

California Bank v. Kenney, 167 *U. S.* 362, 368.

To make application of this oft repeated assertion to this case, it would seem that this undertaking of guaranty, being void and incapable of ratification, and of forming any basis for an action, did not constitute a risk which the stockholder assumed when he subscribed for or purchased his stock, and hence was one which could never have been intended to be imposed upon him under the constitution of Kansas. This liability the Courts have holden is contractual, and is it not the office of this Court to protect one of the parties to the contract against a risk, which he never intended to undertake?

The fact that there may be a class of "dues or debts" for which a stockholder may not be liable seems to be recognized in

Cook on Corporations, 4*th Ed.*, *Sec.* 224.

In the recent case of *Whitman v. Oxford National Bank*, 176 *U. S.*, 562, Mr. Justice Brewer says:

"The word dues is one of general significance and includes all contractual obligations."

An obligation which the corporation had no right to incur, we maintain, cannot be a contractual obligation. It is not such an obligation as the creditors of the corporation are supposed to contract with reference to, nor is it such an obligation as the stockholders in their subscription for stock were supposed to apprehend would be incurred by them. It cannot be said that the stockholder in his subscription for, or purchase of, stock agreed or contracted to be subject to any sueh obligation.

There is no injustice to either party to a pretended contract absolutely unauthorized, in holding that such an alleged contract is not fairly included in the obligations to which the superadded liability of a stockholder attaches.

It protects the stockholder from risks he did not intend to assume, and it does no wrong to the other party, because he had ample notice, or might have had upon enquiry, of the scope of the powers of the corporation to enter inte such a contract.

CONCLUSIVENESS OF JUDGMENT.

But it is claimed that the judgment found against the Loan and Trust Company in Kansas is conclusive as to all these prior propositions and cannot be re-examined.

It is elementary law that judgments may be impeached for fraud and want of jurisdiction. This is recognized as the local law of Kansas.

Ball v. Rees & als. 58 *Kansas*, 614.

And other cases.

We are not quite sure that it cannot reasonably be asserted that a judgment based upon a contract, not within the scope of a corporation to make, obtained by default, without the knowledge of a stockholder is not fraudulent as to the stockholder.

But assuming our premises to be correct, that this is an "ultra vires" contract, beyond the scope of the corporation to make, and that such a contract is not in the intendment of the constitution and laws of Kansas, attaching individual liability to corporate stockholders, it would seem to follow that the judgment might be re-examined to determine whether the contract, which is the basis of this judgment, is one within the constitutional intent or not.

For illustration, a judgment is the highest evidence of a "debt or due." The Supreme Court has expressed some doubt as to whether a claim arising from a tort is comprehended under the term "due," either before or after judgment.

Whitman v. Oxford Nat. Bank, 176 *U. S.* 559–562.

Is a stockholder desiring to raise that question estopped from re-examining the judgment so far as to enable him to ascertain, whether the judgment is founded on a tort or not?

The theory for declining to re-examine a judgment is predicated upon the assumption that the corporation represents the stockholder, and the judgment is conclusive against the corporation and its *privies*. Our answer to this is, that a stockholder is in no sense a privy to a judgment on a contract, not of a class for which he legally assumed the risk.

It is a familiar rule, so well settled that it does not require reference to authorities to support it, that the judgment against the corporation is no evidence that the party said to be individually liable is a stockholder. That question of course does not arise and is not adjudicated in the action against the corporation. It would seem that the question as to whether the "debt or due" upon which the action is based against the corporation itself, is one for which the stockholder is holden under the constitution, is one that does not arise and is not adjudicated in the original action. The one question is just as independent of the issues in the suit against the corporation as the other.

The plaintiff's final contention is, that this judgment against the Loan and Trust Company is conclusive adjudication of whatever is essential to support the judgment.

If, as we have attempted to show, the defendant was *not a privy* to that judgment, because it was based upon a contract not within the intendment of the Kansas constitution, the judgment does not bind him. "Quoad" such a claim he is not a stockholder. A further claim is, that the judgment is a conclusive determination that the contract

was a legal one, and it is not open to defendant *for any purpose* to show that it was "ultra vires."

Such an argument can be based only upon the application of the doctrine of estoppel, so far as the corporation is concerned. That estoppel extends to the stockholder because of representation by the corporation of his interests, if he is a privy to the judgment, not otherwise.

We take it the rule is this: if the finding is general and a judgment is founded upon it, the judgment is conclusive of everything essential to support the judgment; if the finding is special then the judgment is conclusive upon all facts in issue and specially found. If the facts do not support the judgment in law, then it cannot conclude the parties.

The finding in the original suit in Kansas was special as appears by the record, (the judgment following the petition), and does not support the judgment unless you supply facts not set forth in the original declaration and transcript of judgment.

Record, pages 66–81 *inclusive.*

It appears on the face of the facts appearing of record to be an erroneous conclusion of the Court.

It is said that a judgment by default is just as conclusive an adjudication of whatever is necessary to support a judgment as one rendered after answer and contest.

Last Chance Mining Co. v. Tyler Mining Co., 157 *U. S.*, 683–691.

"The essence of estoppel by judgment is that there has been a general determination of a fact * * * a failure to answer is taken as an admission of the truth."

Ibid. p. 691.

Now considering defendant corporation admitted every

word contained in the original declaration in the suit in Kansas, it affords no basis to support an action.

What is a judgment by default; nothing more than a confession or admission in Court by the defendant, of the allegations in the pleadings? If this contract was beyond the scope of the corporation to make, it was beyond the scope of the corporation to ratify. The judgment by default is an attempted ratification of what is incapable of ratification.

In *Board of Com'rs v. Platt*, 79 *Fed.* 567–573, a claim was made in favor of the validity of certain bonds, which the defendant had no power to make, based upon a compromise between the plaintiff and defendant. The court refused to recognize the conclusiveness of the decree because the new agreement could give no life to the invalid act of issuing the bonds. So it seems a judgment by defendant can give no validity to an absolutely unauthorized contract.

Mr. Chief Justice Fuller has said in *Union Pac. Railway v. Chicago &c. Railway Co.* 163 *U. S.* 564, 581. "A contract made by a corporation beyond the scope of its powers express or implied, on a proper construction of its charter, cannot be enforced, or rendered enforceable by the application of the doctrine of estoppel."

Our contention that an absolutely "ultra vires" contract is not such a "debt or due" as is within the intent of the constitution of Kansas imposing individual liability on the stockholder, and that the judgment may be re-examined, for the purpose of ascertaining whether the "debt or due" falls within the class for which the stockholder is liable, is not in conflict with the law as expounded by this Court in

Whitman v. Oxford Bank, 176 *U. S.* 559.

Hancock Nat. Bank v. Farnum, 176 *U. S.* 640, 643–644.

This question did not arise in those cases nor has it

been suggested, or received any consideration, in the Kansas cases of which the following cases are an example.

Steffins v. Gurney, 61 *Kansas* 292.

Ball v. Reese, 58 *Kansas* 614,

And other cases.

In the case at bar the record shows what was proven. There is no occasion for invoking any rule of assumption or presumption.

The examination of this judgment has been forced upon this Court.

Brownsville v. Loague, 129 *U. S.* 503.

The plaintiff in error, instead of putting in a general finding, introduced the transcript of the original petition, and the recital of the facts found by the Court, to sustain its judgment.

It is difficult for us to distinguish in principle between this case, and the several cases in which this Court has holden that contracts made by a corporation after it has gone into liquidation are void.

Richmond v. Irons, 121 *U. S.* 27–60.

Schrader v. Manufacturer's Nat. Bank, 133 *U. S.* 67.

In the latter case, the power of its officers to bind the corporation by the creation of new obligations had ceased; in the case at bar, they never had such power.

Upon the question, as to the construction of the Kansas constitution, we repeat the words of the late Mr. Justice Lamar:

"The simplest and most obvious interpretation of a constitution if in itself sensible, is the most likely to be that meant by the people in its adoption."

Lake County v. Rollins, 130 *U. S.* 662, 671.

The neglect of the Court below to reopen the case, at the stage of the case when permission to do so was asked, and upon the imperfect and unsatisfactory affidavits furnished, would have been, we suppose, a matter of discretion, if it had been pressed and acted upon. No further affidavits than the two mentioned in the request appear ever to have been filed, and the contents of those do not appear of record, and the Court does not appear to have taken any action in the matter. This Court certainly has no data from which to determine whether the ex parte affidavits support the plaintiff's contention or not.

As the case stands, the evidence does not support the pleadings. The plaintiff in his declaration declares these notes were negotiated by the Loan and Trust Company in the regular course of its business, which averment was not only not proven, but is found to be contrary to the facts appearing in evidence, by the Circuit Judge. This averment is followed by another unproven one alleging an interest of the corporation in the notes.

Records, page 24.

J. S. H. FRINK,

For HIRAM BLAKE *and* WALLACE L. MASON,
Executors, Respondents.